(2)

Supreme Court, U.S.
FILED
AUG 30 1993

No. 93-182

In The

Supreme Court of the United States

October Term, 1993

HOLABIRD SPORTS DISCOUNTERS,

Petitioner,

v.

TENNIS TUTOR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

MAXWELL M. BLECHER
RALPH C. HOFER
(Counsel of Record)
BLECHER & COLLINS
611 West Sixth Street
20th Floor
Los Angeles, California 90017
(213) 622-4222

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

RESTATEMENT OF THE QUESTION PRESENTED

Whether the Fourth Circuit correctly applied the standard of evidence required to prove a Section 1, Sherman Act conspiracy, contract, or combination by *Monsanto v. Spray-Rite Service Corp.* 465 U.S. 752, 104 S. Ct. 1464 (1984), in affirming a summary judgment in favor of a manufacturer when there was no evidence of an agreement other than the manufacturer's routine communication with two dealers who inadvertently violated the manufacturer's policy restricting price advertisements?

TABLE OF CONTENTS

Page

RESTATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Introduction and Procedural Posture 1

B. TTI's Advertising Policy and the Business Justification for It 3

C. TTI's Termination of Holabird as a Dealer ... 4

D. TTI's Communications With Two Dealers Explaining TTI's Advertising Policy 5

REASONS FOR DENYING THE WRIT 7

ARGUMENT 8

A. The Decision Below Correctly Applied the Requirement of *Monsanto* and *Matsushita* That Evidence of a Conspiracy Must Tend to Exclude the Possibility That TTI Acted Independently in Enforcing Its Advertising Policy 9

(1) Holabird's Burden of Proof Under The *Monsanto* and *Matsushita* Cases 9

(2) The Application of the *Monsanto* Test to the Facts of the Instant Case 10

B. The Decision Below Does Not Conflict With the Decisions of Any Other Circuit 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Ben Sheftall Distributing Co. v. Mirta de Perales, 791 F. Supp. 1575 (S.D. Ga. 1992) 13

Cranfill v. Scott & Fetzer Co., 773 F. Supp. 943 (E.D. Tex. 1991) 11

H.L. Hayden Co. v. Siemens Medical Systems, Inc., 879 F.2d 1005 (2d Cir. 1989) 11

Helicopter Support Systems v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987) 14, 15

Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987) *cert. denied*, 486 U.S. 1005 (1988) 14, 15

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986) 7, 8, 9, 15, 16

McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 14, 15

Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464 (1984) ..... *passim*

O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464 (9th Cir. 1986) 11

Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989) 8, 9, 13, 14, 15, 16

United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465 (1919) 9, 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Parke-Davis & Co., 362 U.S. 29, 80 S. Ct. 503 (1960) 12, 13, 14

Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) 11

STATUTES

15 U.S.C. § 1 1

MISCELLANEOUS

7 Areeda, *Antitrust Law*, ¶ 1446 at 85-86 (1986) 12

No. 93-182

In The

Supreme Court of the United States

October Term, 1993

HOLABIRD SPORTS DISCOUNTERS,

Petitioner,

v.

TENNIS TUTOR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction and Procedural Posture

This Petition for Certiorari arises from Respondent Tennis Tutor, Inc.'s ("TTI") termination of its former dealer, Holabird Sports Discounters ("Holabird"), the petitioner herein, a former mail order house distributor of TTI's main product, a tennis ball machine known as the Tennis Tutor. Petitioner's Appendix. ("Pet. App.") 5a. On August 5, 1991, Holabird filed a Complaint charging that its termination was in violation of Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1. Pet. App. 3a, 6a.

Holabird alleged that TTI's imposition and enforcement of an advertising restriction violated Section 1 of the Sherman Act. Pet. App. 3a. After approximately one year of full blown discovery, TTI moved for summary judgment on several alternative grounds. *Id.* On October 30, 1992, the District Court granted summary judgment in favor of TTI on the sole ground that Holabird had failed to produce sufficient evidence to show that TTI had entered into a contract, combination or conspiracy in restraint of trade. Pet. App. 4a. The Court of Appeals affirmed. *Id.*

Holabird's factual characterizations in its Petition are at times seriously inaccurate and outright misleading. In particular, Holabird continuously uses the word "agreement" with respect to TTI's advertising restriction as if TTI and its dealers actually used that word or acknowledged the existence of an agreement. In reality, TTI never sought agreement of its dealers to its advertising policy. TTI presented its policy to its dealers, and each dealer made his own choice as to whether to comply. In fact, the District Court reprimanded Petitioner's counsel for offering "evidence" of a conspiracy in the form of "doctored" quotations, and other questionable methods of argument. Pet. App. 10a, footnote 1.

Hence, Holabird's recitation of the facts in its Petition are suspect and should be viewed with caution. TTI's Opposition will correct the factual record as portrayed in the Petition.

B. TTI's Advertising Policy and the Business Justification for It

TTI's advertising policy is contained in its Statement of Policy it provides to all its dealers nationwide. Pet. App. 5a. The pertinent portions of the Statement of Policy provide as follows:

> . . . In line with the above policy statements, Tennis Tutor will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who:
>
> * * *
>
> 3. Advertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements.

Pet. App. 6a.

TTI independently created its advertising policy without any input from its dealers. Pet. App. 2a.

The advertising restriction is narrowly crafted to meet its objective of limiting only one type of price advertising. Pet. App. 9a. It does not prohibit all discount price advertising, only advertisements in the national print media at prices below manufacturer's suggested retail price. *Id.*

TTI has 126 dealers nationwide. Pet. App. 2a. TTI manufactures a portable battery-powered tennis ball practice machine known as the Tennis Tutor. *Id.* TTI's dealers are free to advertise discount prices in the local media, catalogues, flyers or computer buying services. Pet. App. 10a. Holabird has in fact used these techniques

to advertise at discount prices. *Id.* Dealers are free to sell the Tennis Tutor machine at any price, including a discount price. *Id.*

The reason TTI needs the advertising restraint is to protect and enhance its distribution network from national mail order discount houses such as Holabird who "skim" sales from local dealers who actually generated the sales. Pet. App. 9a. The restraint is necessary to prevent "free riding" by national mail order discount houses such as Holabird. Pet. App. 2a. This prohibition against "free riding" is necessary to maintain TTI's national distribution network which would deteriorate if "free riding" continued unchecked. Pet. App. 2a, 9a.[1] "Free-riding" is a recognized anticompetitive phenomenon against which restraints can be lawfully adopted to curb its pernicious effects. Pet. App. 10a, 11a.

C. TTI's Termination of Holabird as a Dealer

In violation of TTI's policy, Holabird placed a "call for price" advertisement for the Tennis Tutor machine in

---

[1] "Free-riding" occurs when a national mail order house such as Holabird takes advantage of customer services offered by local dealers. TTI dealers offer a full range of services necessary to sell the Tennis Tutor such as demonstrations, loaner machines, etc., not offered by a national mail order house such as Holabird. Without the advertising restriction, customers would go to the local dealer for the demonstrations, become convinced to buy the Tennis Tutor, and then actually purchase the machine at a lower price from Holabird. Hence, Holabird is "free-riding" off the efforts of local dealers who actually generated the sales because Holabird provides no services. Pet. App. 2a, 3a.

the October 1990 edition of *Tennis Magazine*, a national publication. Pet. App. 3a, 6a. On September 17, 1990, when TTI first discovered the violation of its unilateral policy against such advertising, it terminated Holabird as a TTI dealer. Pet. App. 3a.

On October 11, 1990, Holabird's attorney, Mr. Stanley Fine, sent a letter to TTI's president, Mr. William Greene, which concluded with a thinly-veiled threat as follows: "Your failure to reinstate my client [as a TTI dealer] within ten days of the date of this letter will result in my client taking appropriate legal action against you for damages and losses." Res. App. 1a, 2a.[2]

In response to the threat of a lawsuit, TTI told Holabird that it would be reinstated as a dealer if Holabird acknowledged in writing that it would abide by TTI's advertising policy in the future. Pet. App. 6a. Holabird refused and has not been a dealer for TTI since then. *Id.*

D. TTI's Communications With Two Dealers Explaining TTI's Advertising Policy

TTI had communications regarding the advertising restriction with only two of its 126 dealers other than Holabird. Pet. App. 11a, 12a. Those two dealers were Sports Express and Associated Tennis Suppliers ("ATS"). *Id.* TTI's one-time contact with these two dealers had no relationship at all to Holabird's termination. *Id.* The contact with Sports Express occurred in June 1990, three

---

[2] "Res. App." means Respondent's Appendix attached hereto.

months before Holabird's termination. *Id.* The contact with ATS occurred in November 1991, 15 months after Holabird's termination, and months after Holabird filed its lawsuit against TTI. *Id.*

In June or July 1990, Greene noticed that Sports Express had placed an ad for the Tennis Tutor in the June 1990 edition of *Tennis Magazine*, which ad violated TTI's advertising restriction. Pet. App. 11a. At the time, Sports Express was not a dealer of TTI, but had placed the advertisement to gauge customer interest, and hence was not aware of TTI's restriction on advertising in national circulation magazines. Pet. App. 3a. Greene contacted Sports Express about the offending advertisement. Pet. App. 3a, 11a, 12a. Sports Express responded that it was its practice to comply with manufacturers' distribution policies and would voluntarily comply in the future. Pet. App. 3a, 11a, 12a.

In November 1991, Greene contacted ATS, a dealer of TTI to inform ATS that it had violated the advertising prohibition in the November issue of *Tennis Magazine*. Pet. App. 12a. ATS responded that it was not aware of the policy because TTI had inadvertently failed to mail ATS a copy of the "Statement of Policy," which contained the advertising prohibition. *Id.* After this discussion with TTI's President, William Greene, ATS stated it would remove the offending ad and would voluntarily comply with the advertising restriction in the future. Pet. App. 3a, 12a.

Finally, after Holabird's termination as a TTI dealer, TTI contacted at least one dealer to prevent it from "transshipping" or "diverting" machines to Holabird in

violation of TTI's policy against transshipment. Pet. App. 12a. The dealer, ATS, stated it was not aware of the transshipping and investigated the incident. *Id.* The ATS division which sold TTI's product reported to TTI that another division of ATS had shipped the machine to Holabird without the appropriate division's knowledge or permission. *Id.* ATS stated that it would respect TTI's policy against transshipment and voluntarily would comply with the policy in the future. *Id.*

REASONS FOR DENYING THE WRIT

The Fourth Circuit's decision affirming the District Court's grant of summary judgment is wholly unremarkable and invokes none of the grounds upon which certiorari is appropriately granted. The decision to grant summary judgment to TTI, after extensive discovery, is nothing more than a routine application of the law to the facts in the aftermath of the Court's decisions in *Monsanto, supra,* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

These two decisions increase the plaintiff's burden of proof on the conspiracy element of Section 1 of the Sherman Antitrust Act, limiting the use of ambiguous circumstantial evidence, and requiring the plaintiff to offer evidence which tends to refute the fact that TTI acted unilaterally and independently in monitoring and enforcing its advertising policy. Moreover, since the only facts pertinent to a possible conspiracy Holabird was able to muster actually demonstrate that no conspiracy existed at all, the application of Fourth Circuit decisions and the

decisions of the other circuits would yield the same result: summary judgment in favor of TTI.

This result is correct because TTI's behavior in interacting with its dealer evokes none of the coercion required for a vertical conspiracy and is substantially below that level of conduct necessary to get evidence of a conspiracy to a jury. In short, the undisputed facts in this case are unexceptional in the wake of *Monsanto* and *Matsushita* and have led to a commonplace and expected result: summary judgment for TTI.[3]

ARGUMENT

Holabird's attempt to upset the District Court's and Court of Appeals' straightforward application of *Monsanto* and *Matsushita* should be rejected out of hand. The interaction in this case between the manufacturer, TTI, and three out of its 126 dealers – Holabird, ATS, and Sports Express – is so sporadic and unrelated that the conduct does not even come close to evidence of a conspiracy sufficient to get to a jury.

Moreover, Holabird's grandiose attempt to create an alleged conflict in the circuits based on the Fourth Circuit's decision in *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), is based on the misreading of a footnote in that case. The *Parkway Gallery* court was not admitting the existence of a conflict in the Circuits, but merely pointing

[3] There appears to be little dispute as to the pertinent facts relating to the conspiracy evidence. Pet. App. 5a.

out by implication that different facts yield different results under the *Monsanto* test. *Parkway Gallery*, 878 F.2d at 806 fn. 4.

A. The Decision Below Correctly Applied the Requirement of *Monsanto* and *Matsushita* That Evidence of a Conspiracy Must Tend to Exclude the Possibility That TTI Acted Independently in Enforcing Its Advertising Policy

(1) Holabird's Burden of Proof Under the *Monsanto* and *Matsushita* Cases

The law is clear that a manufacturer may terminate a dealer at any time for any reason and not offend the antitrust laws, so long as the manufacturer has acted independently in doing so. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468 (1919). The Supreme Court in *Monsanto* properly reaffirmed this principle and explained as follows:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Monsanto, 465 U.S. at 761, 104 S. Ct. at 1469.

In *Monsanto*, the Supreme Court established the plaintiff's burden of proof on the conspiracy element of a vertical restraints case. That burden of proof is as follows:

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that

> reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768, 104 S. Ct. at 1473.

In *Matsushita*, the Supreme Court elaborated on the plaintiff's burden of proof set out in *Monsanto*:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 *must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.*

Matsushita, 475 U.S. at 588 (internal quotation and citations omitted). [Emphasis added.]

(2) The Application of the *Monsanto* Test to the Facts of the Instant Case

The Courts below correctly applied the *Monsanto* and *Matsushita* decisions to hold that Holabird had not presented sufficient evidence of a conspiracy to get to a jury. It is clear that TTI's termination of Holabird did not create a conspiracy and that Sports Express's and ATS's voluntary compliance with TTI's advertising policy does not constitute a conspiracy.

If the manufacturer can offer a legitimate business reason for terminating a dealer, the presumption of independent action is strengthened. *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1014-16 (2d Cir. 1989); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 663 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987). TTI's business reason for terminating Holabird was for Holabird's violation of the TTI advertising policy by Holabird's placing a "call for price" advertisement in the October 1990 edition of *Tennis Magazine*. Pet. App. 6a. A manufacturer's termination of a dealer because it failed to comply with the manufacturer's advertising policies is a legitimate reason for termination. *Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943, 956 (E.D. Tex. 1991). *See also O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986), (a manufacturer's termination of a dealer because it operated as a mail order house is a legitimate reason for termination).

In the complete absence of any dealer complaints leading up to the termination of Holabird, there is no question that there was no evidence of a "common scheme" to terminate Holabird. TTI's termination of Holabird does not support any inference of a conspiracy. *Monsanto*, 465 U.S. at 768, 104 S. Ct. at 1473.

In addition, Holabird has misapplied the test of *Monsanto* by completely ignoring Holabird's burden of proof to refute the presumption that TTI acted unilaterally in informing ATS and Sports Express of TTI's advertising policy. Pet. App. 11a, 12a. It is clear that TTI may maintain an open channel of communications with its dealers about this policy, it may monitor compliance with this policy, and it may seek to eliminate, through unilateral

actions, "free riding" dealers by adopting the appropriate marketing strategies. *Monsanto*, 465 U.S. at 762-63, 104 S. Ct. at 1470. TTI's "strongly felt concern" about its limited and narrowly crafted advertising restraint "does not necessarily mean that it has done more than the *Colgate* doctrine allows." *Id.*

Thus, there is no question that TTI's normal business procedure of monitoring compliance with its advertising restraint by discussing two prohibited *Tennis Magazine* ads with ATS and Sports Express is well within the realm of unilateral action envisioned by *Colgate* and reinforced under *Monsanto*. *Id.* The law is unequivocal that voluntary compliance by a dealer in a manufacturer's policy does not result in an antitrust conspiracy, even if the distributor disagrees with the policy and is complying in order to avoid termination. *Monsanto*, 465 U.S. at 761, 104 S. Ct. at 1469. ("[A] dealer is free to acquiesce in the manufacturer's demand in order to avoid termination."); *United States v. Parke-Davis & Co.*, 362 U.S. 29, 47, 80 S. Ct. 503, 513 (1960).

This principle of compliance voluntarily compelled by a disagreeable business choice does not rise to the level of "coercion" necessary for an antitrust conspiracy. 7 Areeda, *Antitrust Law*, ¶ 1446 at 85-86 (1986). Professor Areeda states that, after *Monsanto*, "no agreement is formed when a dealer unwillingly complies solely because he wishes to avoid termination." *Id.* ¶ 1451e at 128. If mere voluntary compliance alone could prove an unlawful agreement, the *Colgate* doctrine would be rendered meaningless. *Monsanto*, 465 U.S. at 761, 104 S. Ct. at 1469.

Thus, in order to find a vertical conspiracy, Holabird must provide proof of a well-established pattern of coercion evidenced by a complex plan to enforce the vertical restraints shown by unambiguous evidence such as terminations of dealers, wide-scale dealer contacts, and employment of third parties to carry out enforcement schemes. *Parke-Davis*, 362 U.S. at 45-46, 80 S. Ct. at 512-13; *Ben Sheftall Distributing Co. v. Mirta de Perales*, 791 F. Supp. 1575, 1582-83 (S.D. Ga. 1992).

Holabird has offered no proof of a complex enforcement scheme. Instead, Holabird has focused inordinately on two isolated contacts TTI had respectively with Sports Express and ATS. These communications revealed only that Sports Express and ATS elected to voluntarily comply with TTI's advertising policy. In the absence of coercion and a conscious commitment to a common scheme, there is no evidence of a conspiracy. *Monsanto*, 465 U.S. at 764, 104 S. Ct. at 1471; *Parke-Davis & Co.*, 362 U.S. at 45-46, 80 S. Ct. at 512-13.

B. The Decision Below Does Not Conflict With the Decisions of Any Other Circuit

The Fourth Circuit's decision in this case is not in conflict with the law in other circuits, nor would have adjudication by another circuit created a different result. Holabird's purported evidence of a conspiracy is so weak that it would have lost at summary judgment in the Eighth and Eleventh Circuits as well.[4]

---

[4] Based on one innocuous footnote by the Fourth Circuit in its Opinion in the *Parkway Gallery* case, Holabird claims that

A quick examination of the facts and the law in the cases cited by Holabird demonstrates the weakness of the Petitioner's arguments. Holabird has in essence already conceded that the Fourth Circuit correctly applied the law of its own circuit as set out in *Parkway Gallery*, 878 F.2d 801 (4th Cir. 1989). *See* Petition at 6. Rather, Holabird is claiming that *Parkway Gallery* is in conflict with *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988), and *Helicopter Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 (11th Cir. 1987). *See* Petition at 6, 7. Finally, Holabird argues that *Parkway Gallery* also conflicts with *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

An examination of these cases reveals no conflict or inconsistent result as to Holabird. In *Parkway Gallery* the Court found no conspiracy based on the manufacturer's adoption of a territorial limitation policy for solicitation of telephone sales, even though the dealers participated in the formulation of the policy and the manufacturer received assurances of compliance from some dealers. *Parkway Gallery*, 878 F.2d at 806. Both *McCabe's Furniture* and *Hughes Helicopter* involved the standard facts of *Monsanto* and *Parke-Davis*, including, but not limited to: dealer complaints, subsequent termination in response to the complaints, enforcement schemes and post-termination confirmation letters which indicated "the problem is taken care of." *See McCabe's Furniture*, 798 F.2d at 326-27;

---

both the *Parkway Gallery* case and the instant case are in conflict with Eighth and Eleventh Circuit decisions. Holabird's Petition for Writ of Certiorari ("Petition") at 5, 6.

Hughes Helicopter, 818 F.2d at 1535. These facts evidence a complex enforcement scheme which is a far cry from Holabird's evidence of voluntary compliance by Sports Express and ATS.

Moreover, *Isaksen* does not change the result. In *Isaksen* there was direct evidence of resale price fixing demands and complicated methods of coercion. *Isaksen*, 825 F.2d at 1162-63. The *Isaksen* court merely stated that evidence in the form of a direct admission such as a dealer saying, "I agree to participate in price-fixing," is not necessary to survive judgment. *Id.* at 1164.

Again, *Isaksen* does not create a conflict with *Parkway Gallery* which in no way requires outright direct admissions of the antitrust violation to survive summary judgment. *Parkway Gallery*, 878 F.2d at 806. Nor does footnote 4 in *Parkway Gallery* admit the existence of a conflict with the Eight Circuit (the *McCabe* case) or the Eleventh Circuit (the *Hughes Helicopter* case). In both *McCabe* and *Hughes Helicopter* the evidence of conspiracy was compelling and way beyond the "low-level" sporadic and isolated conduct exhibited by TTI in the instant case. The result for Holabird would have been the same in both these other circuits: an adverse ruling at summary judgment.

Consequently, the *Parkway Gallery* court's parenthetical remark contained in footnote 4 that the Eighth and Eleventh Circuits have "misconstrued" the "tends to exclude" requirement of *Monsanto* and *Matsushita* has no bearing on *Holabird* because Holabird was not able to point to any facts consistent with the inference of a conspiracy. *Parkway Gallery*, 878 F.2d at 806 fn. 4. There is no doubt that *Parkway Gallery* was correctly decided under

APPENDIX

APPENDIX

October 11, 1990

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Mr. William Green,
President
Tennis Tutor, Inc.
2612 West Burbank Blvd.
Burbank, California 91505

Green Exh. 21 for I.D.
Witness: Bill Green
Date: 6-17-92
Rebecca Corral, RPR/CSR
#7021

Dear Mr. Green:

As I indicated to you in our recent conversations, my client, Holabird Sports Discounters, was not in violation of your company's Statement of Policy when Holabird placed an ad for Tennis Tutor in the October, 1990 issue of *Tennis* magazine.

Your company's Statement of Policy uses the words "call for price advertisements", while my client's advertisement used the word "call". The word "call" means a lot of things, such as description of item, availability of size or model, description of model, as well as general questions concerning the merchandise involved. The word "call" as used in this ad *does not in any way mean* call for price advertisements.

In your conversation with David Hirshfeld on September 17, 1990, you stated that you would not ship Holabird any goods for a period of one year because of the ad placed in *Tennis* magazine. Your action is unfounded, arbitrary and illegal. In our conversation of September 26, 1990, I requested that you rescind your decision to stop shipment of goods to my client for one

year and reinstate my client immediately. You indicated that you would not do this.

It is apparent that others have violated your policy and you have not taken any action against them. You have acted in an arbitrary, as well as discriminating, manner by taking action against Holabird, which did not even violate your policy. Your failure to supply goods to my client will result in excessive damages and future losses to my client. I request that you reconsider your position and reinstate Holabird Sports Discounters as a supplier immediately.

Your failure to reinstate my client within ten days of the date of this letter will result in my client taking appropriate legal action against you for these damages and losses. I urge you to give this matter your immediate and preferred attention.

Sincerely,

Stanley S. Fine

SSF:bmh
cc: Holabird Sports Discounters